

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 8, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP578

Cir. Ct. No. 2016CV358

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**MEMBERS OF SKY PARK INDUSTRIAL CENTER,
AN UNINCORPORATED NONPROFIT ASSOCIATION,**

PLAINTIFF-APPELLANT,

V.

**THE CITY OF EAU CLAIRE, GARBO, LLC AND
ADVANCED ENGINEERING CONCEPTS,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Eau Claire County:
JON M. THEISEN, Judge. *Affirmed.*

Before Lundsten, P.J., Blanchard, and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. The Members of Sky Park Industrial Center (the “Members”) appeal a circuit court order entered on March 14, 2017. In that order, the court determined that certain protective covenants pertaining to real property known as Sky Park Industrial Center were unambiguous, and that defendants Garbo, LLC, Advanced Engineering Concepts, LLC, and the City of Eau Claire were entitled to summary judgment. For the reasons set forth below, we affirm the order of the circuit court.¹

BACKGROUND

¶2 The Members are four owners of property located in a real estate development in the City of Eau Claire known as Sky Park Industrial Center, or Sky Park. On October 4, 1984, a document entitled “Protective Covenants” was recorded with respect to Sky Park. The real property encumbered by the Protective Covenants is described as follows:

Part of the NW1/4, Section 31, T 27 N, R 9 W, a part of the SE1/4-NE1/4 and part of Government Lot 5, Section 36, T 27 N, R 10 W, City of Eau Claire, Eau Claire County, Wisconsin, now platted and known as Lots 1 through 33, of Sky Park.

¶3 The Protective Covenants state the permitted and prohibited uses for Sky Park, as well as conditional uses permitted only upon the granting of a conditional use permit. The Protective Covenants have been amended several times since 1984. The amendment procedure is set forth in the Protective Covenants:

¹ Advanced Engineering Concepts, LLC, and Garbo, LLC, are respondents to the appeal, but informed this court by letter dated July 19, 2017, that they would not be filing responsive briefs.

The within covenants and restrictions may be modified and amended only upon the recording of an instrument to said effect duly signed by the then owners of a majority of the acreage in said Industrial Park with the approval thereof by the City Council as evidenced by a resolution duly adopted by a majority of all the voting members of the City Council.

¶4 The Amendments at issue in this case were adopted in 2012 and 2016. In 2012, the City Council of the City of Eau Claire amended the Protective Covenants by adding several additional uses to the then-existing list of permitted conditional uses of Sky Park. Among the additional uses added by the 2012 amendment was “Office Activities.” The 2012 amendment was later recorded with the register of deeds. Then, by ordinance adopted by the City Council on July 12, 2016, and later recorded, the City again amended the Protective Covenants, removing a requirement that all structures within Sky Park be protected with automatic sprinklers or other automatic fire extinguishing systems. As amended in 2016, the Protective Covenants instead require that structures have “automatic sprinklers or some other automatic fire extinguishing system if required by State Building Codes.”

¶5 In the summer of 2016, Advanced Engineering Concepts (AEC) engaged in negotiations for the purchase of Lot 8 in Sky Park from the City of Eau Claire, with the intention of constructing an office building on the lot. Garbo, LLC, the entity that took title in the negotiated purchase of Lot 8 from the City, applied for and obtained a conditional use permit on behalf of AEC. The City of Eau Claire Plan Commission approved a site plan for the construction of the proposed building on Lot 8.

¶6 The Members filed a complaint in circuit court against the City of Eau Claire, AEC, and Garbo, seeking declaratory judgment as to their rights under

the Protective Covenants as well as a temporary restraining order prohibiting AEC from commencing development on Lot 8. Among other allegations, the complaint asserted that AEC's proposed office building violated architectural standards found in the Protective Covenants. The Members amended their complaint twice, adding a claim that Lot 1 of Sky Park, which is owned by the City of Eau Claire, should not have been counted in the determination of the ownership of a majority of the acreage in Sky Park for purposes of the amendment procedure and that, therefore, the 2012 and 2016 amendments to the Protective Covenants were invalid.

¶7 The circuit court entered an order on September 19, 2016, denying the Members' request for a temporary restraining order, after a hearing. In the same order, the court made a finding that the City of Eau Claire is, and always has been, the owner of a majority of the acreage in Sky Park.

¶8 Garbo and AEC filed a motion for summary judgment. In their supporting brief, Garbo and AEC argued that the City, as the owner of the majority of the acreage in Sky Park, had the authority to amend the Protective Covenants, and that the 2012 and 2016 amendments permitted the construction of the proposed building for office activities. The City of Eau Claire filed its own summary judgment motion, making a similar argument in its supporting brief. The Members filed a brief opposing the motions for summary judgment, arguing that the 2012 and 2016 amendments to the Protective Covenants were not properly authorized. After a hearing, the court found that the Protective Covenants unambiguously require that Lot 1 be included in the acreage considered when determining whether the owners of a majority of the acreage in Sky Park have agreed to amend the covenants. The court granted summary judgment in favor of Garbo, AEC, and the City of Eau Claire, and the Members now appeal.

DISCUSSION

¶9 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶9, 324 N.W.2d 180, 781 N.W.2d 503. The legal standard is whether there are any material facts in dispute that entitle the party opposing summary judgment to a trial. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751.

¶10 The Members raise several issues on appeal, some of which are unclear and overlapping. Any reference made by the Members that they intend to present as an argument which we do not specifically address is rejected because it is inadequately briefed and lacks discernable merit. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). We resolve this appeal based on our conclusions that all of the issues raised by the Members rely on contentions that Lot 1 should not be counted for the purpose of determining the “owners of a majority of the acreage” under the Protective Covenants, and that the City lacked authority to approve and record the amendments made to the covenants in 2012 and 2016, and we reject these two contentions. For the reasons discussed below, we reject the Members’ arguments.

¶11 We use the rules of contract interpretation in ascertaining the meaning of protective covenants. *Solowicz v. Forward Geneva Nat.*, 2009 WI App 9, ¶42, 316 Wis. 2d 211, 763 N.W.2d 828 (Ct. App. 2008). If a contract is unambiguous, our attempt to determine the parties’ intent is limited to the four corners of the contract, without consideration of extrinsic evidence. *Huml v. Vlazny*, 2006 WI 87, ¶52, 293 Wis. 2d 169, 716 N.W.2d 807. The language in a restrictive covenant is ambiguous if it is susceptible to more than one reasonable

interpretation. *Zinda v. Krause*, 191 Wis. 2d 154, 165-66, 528 N.W.2d 55 (Ct. App. 1995).

¶12 The Members’ contention that Lot 1 is excepted from operation of the Protective Covenants is contradicted by the plain language of the Protective Covenants. The legal description of the real property encumbered by the covenants includes “Lots 1 through 33, of Sky Park.” The Protective Covenants also provide unambiguously that the covenants may be amended “upon the recording of an instrument to said effect duly signed by the then owners of a majority of the acreage in said Industrial Park with the approval thereof by the City Council[.]” The Protective Covenants expressly exclude certain entities from being counted as owners for purposes of “determining ownership of the majority of the acreage[.]” Those excluded entities are “mortgagees and the holders of security devices who are not in possession; lessees, tenants, and option holders[.]” Notably, the City of Eau Claire is not listed among the excluded entities.

¶13 The Protective Covenants provide that “[t]he ownership of a majority of the acreage shall be determined on the basis of the number of square feet owned as compared to the total number of square feet, excluding public streets, within the total development.” We do not read this provision, or any of the other contractual provisions discussed in the parties’ briefs, as susceptible to more than one reasonable interpretation, as is required for concluding that a covenant is ambiguous. *See Zinda*, 191 Wis. 2d at 165-66. Unlike the square footage of public streets, the square footage of Lot 1 is not excluded from the “total development” for purposes of determining a majority of the acreage.

¶14 The Members have conceded that, if Lot 1 counts toward the total acreage of Sky Park, then the City of Eau Claire is the majority owner of property

in Sky Park by acreage. As we concluded above, the Protective Covenants unambiguously include Lot 1 for purposes of determining the ownership of a majority of the acreage. Therefore, we agree with the City's position that, as the undisputed owner of Lot 1, it is the owner of a majority of the acreage in Sky Park.

¶15 To repeat, the Protective Covenants for Sky Park provide that amendments may be made “upon the recording of an instrument to said effect duly signed by the then owners of a majority of the acreage in said Industrial Park with the approval thereof by the City Council[.]” The undisputed facts in the record reflect that the City followed that process here. Both the 2012 and 2016 amendments were signed by officials of the City of Eau Claire, approved by ordinance of the City Council, and recorded with the county register of deeds. In light of these facts, there is no genuine issue of material fact as to the validity of the amendments, and we affirm the circuit court's order granting summary judgment in favor of the City, AEC, and Garbo.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

